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Bloody Crossroads African-Americans and The Bork Nomination: A Bibliographic Essay

J. Clay Smith Jr.

"Bloody Crossroads"

AFRICAN-AMERICANS and the BORK NOMINATION: A BIBLIOGRAPHIC ESSAY

J. Clay Smith, Jr.*

> Two diverging traditions in the mainstream of Western political thought-one "liberal," the other "conservative"-have competed, and still compete, for control of the democratic process and of the American constitutional system; both have controlled the direction of our judicial policy at one time or another.
>
> - Alexander M. Bickel[1]

> The clash over my nomination was simply one battle in this long-running war for control of our legal culture.
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> - Robert H. Bork[2]

On July 1, 1987 President Ronald Reagan announced his nomination of Judge Robert H. Bork to succeed Justice Lewis Powell

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[1] Alexander M. Bickel, The Morality Of Consent 3 (1975), hereafter, Morality Of Consent.

[2] Robert H. Bork, The Tempting of America The Political Seduction of the Law 2 (1990), hereafter, Tempting of America. See also, Book Reviews Essays: Gerard V. Bradley, Slaying the Dragon of Politics with The Sword of Law: Bork's Tempting of America, 1990 Univ. of Ill. L. Rev. 243; Stephen L. Carter, Bork Redux, or How The Tempting of American Led The People To Rise And Battle For Justice, 69 Tex. L. Rev. 759 (1991); Lyle Denniston, Bork: The Tempting of America: The Political Seduction Of The Law, 88 Mich. L. Rev. 1291 (1990); Gene R. Nichol, Jr., The Tempting of America; The Political Seduction Of The Law, 76 Va. L. Rev. 337 (1990).

as Associate Justice of the Supreme Court of the United States.[3]

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[3] Ultimately, Anthony M. Kennedy, a judge on the Ninth Circuit, since May 30, 1975, filled the vacancy of Justice Lewis F. Powell, Jr., after Judge Douglas H. Ginsburg, of the District of Columbia Circuit, on October 14, 1986, asked the President to withdraw his nomination to the Supreme Court. Judge Ginsburg retained his seat on the circuit court. See Herman Schwartz, Packing The Courts 119-149 (1988); Ruth Marcus and Al Kamen, 3 Circuit Judges Top High Court List, Wash. Post, Oct. 28, 1987, at A3; Steven V. Roberts, Ginsburg Choice Renews Tension Between Factions in White House, N.Y. Times, Oct. 31, 1987, at 1; Stephen Wermiel, Judge Ginsburg Used Marijuana At Times in Past, Wall St. J., Nov. 6, 1987, at 54; Steven V. Roberts, Critics Cautious On Judge's Record, N.Y. Times, Nov. 5, 1987, at B11; Linda Greenhouse, Cabinet Official Advises Ginsburg To Give Up Quest, N.Y. Times, Nov. 7, 1987, at 1; Michael Specter and James R. Dickenson, Ginsburg Withdraws as; Nominee to the Supreme Court, Wash. Post, Nov. 8, 1987, at 1.

After Judge Ginsburg withdrew as a nominee to the Supreme Court President Ronald Reagan nominated Judge Anthony M. Kennedy to the post, who was confirmed. William Raspberry, After Ginsburg--A Lesson for the President, Wash. Post, Nov. 9, 1987, at A17; Lou Cannon and Ruth Marcus, Judge Kennedy Likely Nominee, Wash. Post, Nov. 9, 1987, at 1; Again, a Nominee for the Court, Wash. Post, Nov. 12, 1987, at A22; Linda Greenhouse, Reagan Nominates Anthony

Kennedy To Supreme Court, N.Y. Times, Nov. 12, 1987, at 1; Stuart Taylor, Jr., Judge Kennedy: Tilting Right but Not Far, N.Y. Times, Nov. 15, 1987, at 1; Helen Dewar and Ruth Marcus, Kennedy Hearings Set, Dec. 14, Wash. Post, Nov. 21, 1987, at A3; Stuart Taylor, Jr., Speeches Offering Insight Into Judge Kennedy, N.Y. Times, Dec. 1, 1987, at 1; Nominee to Court Says Judges Should Avoid Making Policy, N.Y. Times, Dec. 2, 1987, at A26; Ruth Marcus and Helen Dewar, NOW Opposes Kennedy For Supreme Court, Wash. Post, Nov. 20, 1987, at A3; Linda Greenhouse, Senators Predict Fast Confirmation of Judge Kennedy, N.Y. Times, Dec. 16, 1987, at 1; Linda Greenhouse, Judiciary Panel Focuses On Bork, N.Y. Times Dec. 17, 1987, at A24; Linda Greenhouse, Senate, 97 to 0 Confirms Kennedy to High Court, N.Y. Times, Feb. 4, 1988, at A18; Chester A. Higgins, Sr., Blacks Offer No Opposition to Judge Kennedy, Wash. Afro-American, Jan. 12, 1988, at 3.

On February 5, 1988 Judge Bork resigned his seat on the District of Columbia Circuit Court of Appeals and return to private life as a consultant and a lawyer. Linda Greenhouse, Judge Bork Is Stepping Down To Answer Critics and Reflect, N.Y. Times, Jan. 15, 1988, at 1; Aaron Freiwald, Bork Finds Lucrative Niche in Law and Ideas, Wash. Legal Times, Dec. 12, 1988, at 1; Alan C. Miller, After Rejection There's Honorarium For Bork, Los Angeles Times, May 21, 1988, at Part 2, 10. Clarence Thomas, the chairman of the Equal Employment Opportunity Commission, replaced Judge Bork on the

Judge Bork had been, on February 12, 1982, President Reagan's first appointment to the United States Court of Appeals for the District of Columbia Circuit. A former United States Solicitor General and long-time Yale University law professor, most observers regarded Judge Bork as a technically well qualified legal scholar. Yet two and one half months later his nomination was rejected decisively by the full Senate by a vote of fifty eight to forty-two.[4]

This annotated bibliographic essay is about a single Supreme Court nomination, unique for the insight it provided into the ongoing battle for ideological control of the "legal culture" of our court system and the fate of the Constitution. It is intended to be used as a research tool by students of the judicial process. The annotation is composed of selected articles about African-Americans the Bork nomination.

One must ask whether the crossroads of law and politics and the collisions that occur during the confirmation process for the Supreme Court is any more unique to the Bork nomination than other

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circuit court on April 30, 1990.

[4] Linda Greenhouse, Bork's Nomination Is Rejected, 58-42; 'Reagan Saddened', N.Y. Times, Oct. 24, 1987, at 1; The Message of Judge Bork's Defeat, Wash. Post, Oct. 24, 1987, at 30.

nominations to the court.[5] While some may differ on the subject, it is possible that the Constitution allows for this type of collision. Under Article II, section 2 of the Constitution the President is charged with the responsibility of selecting a person

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[5] See e.g., The Carswell Vote; "What's Good For The Court...Would Be Good For The President, Wash. Post, April 9, 1970, at A18; Hearings of George Harrold Carswell and Clement F. Haynsworth, Jr., 91st Cong., 1st Sess., on Nomination of Haynsworth, of South Carolina, To Be Associate Justice of The Supreme Court of The United States, Sept. 16-19, 24-26, 1969; 91st Cong., 2d Sess., on Nomination of George Harrold Carswell, of Florida, To Be Associate Justice of the Supreme Court of the United States, Jan. 27-29, Feb. 2-3, 1970. Both nominations were rejected by the Senate. Carswell, Haynsworth Votes, Wash. Post, April 9, 1970, at 1. Spencer Rich, Senate Rejects Carswell, 51-45, Wash. Post, April 9, 1970, at 1. The rejection of Judges Carswell and Haynesworth brought calls to The American Bar Association for reform in its role in selecting Supreme Court Justices, Lawrence E. Walsh, Selection of Supreme Court Justices 56 A.B.A.J. 555 (June, 1970). See also, Laura Kalman, Abe Fortas 319, 355 (1990) (Defeat of the nominations of President Lyndon Johnson of Abe Fortas, to be Chief Justice, of The United States Supreme Court); Hearings of Abe Fortas And Homer Thornberry, Before The Committee on Judiciary, U.S. Senate, 90th Cong., 2d. Sess., June 11-12, 16-20, 22-23 (1968); id., Part 2, 13-16, 1968.

to nominate to the United States Supreme Court.[6] Prior to the nomination, exactly what individual presidents have considered, with whom they have consulted, or the plans and strategies to achieve their constitutional objectives has remained a mystery, though patterns have been identified.[7] It is a mystery because there is nothing in the Constitution that requires presidents to disclose the manner or the process in which they select the nominees. However, the act of selection is a political act, done by a person holding a political office, who nominates a candidate to the United States Senate, which is politically empowered by the people and the Constitution to give its advice and consent, or to withhold its consent, lacking the non-concurrence of a "two thirds of the Senators present."[8]

Judge Bork has described his nomination to the United States Supreme Court in military terms: as being "one battle in this long-running war for control of our legal culture."[9] What war is he

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[6] U.S. Const., art. II, sec. 2 states, in relevant part: "The President...shall have Power, by and with the Advice and Consent of the Senate to...appoint...Judges of the Supreme Court...."

[7] Henry J. Abraham, Justices And Presidents A Political History of Appointments To The Supreme Court 1-12, 349-373 (3d ed. 1992); Joel B. Grossman, Lawyers and Judges 24-48 (1965), discussing "The Politics of Judicial Selection: An Overview."

[8] U.S. Const. art. II, sec. 2.

[9] R. Bork, Tempting of America 2 (emphasis added).

referring to? Does such combat commence when a vacancy occurs on the court? Is the objective of the battle plan to capture the judgement of a nominee prior to the act of nomination, or is it a war to control....the direction of our judicial policy[?]"[10] Hopefully, the control of judgement has not prevailed in the war to control our legal culture.[11] Attempting to control judgement prior to its exercise is quite an exercise in metaphysics, but if it is done, that war is not one to control a legal culture, but to control a political culture.

The nomination process need not and indeed in most instances in history has not been a war, but it is and can be a forum to

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[10] A. Bickel, Morality of Consent 3.

[11] However, it is just plausible to argue that as long as the Court's membership is composed of two diverging traditions--one liberal, the other conservative--it will always "involve differences of fundamental outlook regarding the Constitution and the judge's role in construing it." Charles A. Leonard, A Search For A Judicial Philosophy 1 (1971) (quoting Justice Felix Frankfurther, 24 Encyclopedia of the Social Sciences 480 (1934)). This means that at various times in our history the president and congress will be at war to control legal culture. The role that African-Americans play in the political process supporting or in oppositing to nominees becomes all the more important because the diverging traditions, and of history, may affect them exceptionally.

determine or to flush out "diverging traditions,"[12] or to unearth the definition of "legal culture" from Supreme Court nominees.

The Bork nomination was an important occurrence in the history of our legal culture. For Black Americans, however, the events surrounding the nomination and Judge Bork's ultimate rejection are especially significant.[13] Judge Bork's judicial philosophy - including his support for "neutral" principles and an "original understanding"[14] of the meaning of the Constitution - was viewed as a direct threat to the concept of a "living Constitution" which gain strength in Brown v. Board of Education.[15] Brown outlawed

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[12] Alexander M. Bickel, Morality of Consent 3.

[13] William T. Coleman, Jr., Too Much at Stake for Bork Approval, The St. Louis American, Sept. 17, 1987, at 4A.

[14] Robert H. Bork, Neutral Principles And Some First Amendment Problems, 47 Ind. L.J. 1, 12-16 (1971); Robert H. Bork, Tempting of America 76-77, 182.

[15] 347 U.S. 483 (1954). See Thurgood Marshall, The Constitution: A Living Document, 30 How. L.J. 623 (1987). There, Justice Thurgood Marshall said, "[T]he true miracle was not the birth of Constitution, but its life, a life nurtured by us through two turbulent centuries of our own making, and a life embodying much good fortune that was not...I plan to celebrate the bicentennial of the Constitution as a living document including the Bill of Rights and the other amendments protecting individual freedoms and human rights." Id. 627-628.

racial segregation in public elementary education but contrary, some say, to the "original understanding" of the authors of the Fourteenth Amendment.[16]

The concept of a "living constitution" has brought value and legitimate meaning to equal protection of the laws.[17] Yet, Judge Bork would apply a formalistic version of the Constitution. Although he claims to concur in the result of Brown, he disagrees with the progeny of Brown dismissing the subsequent cases as, "social engineering from the bench"[18] and "adventures in policymaking."[19] Commentators have pointed out the inconsistency in this position.[20] At odds with Bork, Professor Herbert Wechsler, a conservative scholar, would empower the Court to interpret the Equal Protection Clause applying a method which leaves "room for expanding content as time passes and conditions change."[21]

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[16] Ibid. But see, Robert H. Bork, Tempting of America 82, 84.

[17] J. Clay Smith, Jr., Toward a Pure Legal Existence: Blacks and the Constitution, 30 How. L.J. 921, 934 (1981).

[18] Robert H. Bork, Tempting of America 82, 84.

[19] Id. at 83.

[20] Book Note, The Priest Who Kept His Faith But Lost His Job, 103 Harv. L. Rev. 2074, 2075, n. 11 (1990).

[21] Robert Bork, Tempting of America 79, n. 24, quoting Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 32 (1959). Bork called Wechsler's interpretation "an error fatal to his [neutral principles] argument" because "it

Bork's Tempting of America is a point of view which should be critically read not only by law professors (who, as members of law faculties, are at times scored in his work), [22] but by counter-

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leaves the judge without guidance." Ibid. Bork is no Wechsler. He is Bork, bound to the right of Wechsler's views on the Brown decision and its progeny. Compare, Herbert Wechsler, Principles, Politics & Fundamental Law 31 (1961), questioning the basis of civil rights decisions of the United States Supreme Court, with Loren Miller, The Petitioners: The Story of The Supreme Court Of The United States And The Negro 349-364 (1966).

[22] Bork, Tempting of America 5-7. Judge Bork's criticism of law schools and law professors, who he refers to as "constitutional sophisticates" is curious because as a law Professor at Yale University he held hundreds of students captive to his views. There is more than an interference in Tempting of America that law professors do not believe that judges are bound by the text of the Constitution. Id. at 5. This inference is one that appears to reject other forms of methodology. American law schools and law professors, like Judge Bork and the Yale University's law school are among "the institutions shaped by the culture of which they are a part...that train the lawyers who are needed to make democratic government work." Paul D. Carrington, Butterfly Effects: The Possibilities Of Law Teaching In a Democracy, 41 Duke L. J. 741, 746 (1992). However, it is possible for instutions to change, as some law schools were influenced to

majoritarians as well. [23] It should also prove useful to those in the executive branch whose appointment criteria do not consider African-American lawyers for judicial appointment to the judiciary because they may offer a traditon and legal culture that may help to free the nation from the "web of its own history.[24]

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change because of the civil rights movement during the 1960s. The moral outcry against segregation helped to free the nation from "the web of its own history." This outcry required American law schools to pay closer attention to "complex legal questions" associated "with all aspects of the student revolution." Robert L. Stevens, Law School: Legal Education America from the 1850s to the 1980s 232 (1983); Richard L. Abel, American Lawyer 212 (1989), referring to the law school as "a powerful socializing agent".

[23] See Alexander M. Bickel, The Least Dangerous Branch 16, 21 (1962), discussing the "counter-majoritarian difficulty." To his credit, Bork acknowledged that "conservatives have surrendered to" counter-majoritarian themes "when it has suited their purpose." Robert H. Bork, Tempting of America 2, 7; Other agree with him. See, Guido Calabresi, Forward: Antidiscrimination and Constitutional Accountability (What the Bork - Brennan Debates Ignore), 105 Harv. L. Rev. 80, 141-142 (1991).

[24] Robert L. Stevens, Law School: Legal Education in American From the 1850s to the 1980s 232 (1983). See also, A. Leon Higginbotham, The Case of the Missing Black Judges, N.Y. Times, July 29, 1992, at A15; Elaine R. Jones and Janice King-Robinson, Choices: Appointing Blacks To The Federal Judiciary, 2 Nat'l. Bar

In his book The Tempting of America The Political Seduction of the Law, Judge Bork describes his nomination battle as "[bloody] crossroads where law and politics meet." [25] This annotated bibliographical essay will provied students of the judicial appointment process with insight into the events surrounding what Judge Bork sees as his own collision with [African Americans] in this bloody intersection to "[control] the direction of our judicial policy."[26]

Assn. Magazine 16 (July, 1988), and David E. Anderson, The Promise of More Black Judges, 19 Focus 7, (July, 1991), which all indicate no significant increase in the appointment of African-American judges to the federal courts during the 1980s.

[25] Id. at 269.

[26] The words in quote are those of Alexander M. Bickel, in his book Morality of Consent 3. Robert H. Borks words sound an echo: "...The focus of the struggle, the commanding height sought to be taken, as indeed it partially has been, is control of the courts and the Constitution." Tempting of America 3.

Bork's Original Intent and Neutral Principles Harmful to Blacks

August 29, 1987

Black Frat Blasts Bork Nomination, The Louisiana Weekly, at 5, col. 4.

Judge Bork is leading "guru" theoretician of the conservative legal movement which purports to return the constitution to original intent. But the original intent of the Constitution condoned slavery and, in fact, classified Blacks as 3/5 of a person. "It is thus clear that Judge Bork's nomination to the highest court of this Nation poses a serious threat to the continuing quest of Black America for equality under law," according to Randall C. Bacon, Grand Polemarch of Kappa Alpha Psi Fraternity, Inc. Kappa Alpha Psi Fraternity, Inc. has called upon all of its 78,000 college-trained members to write to their Senators requesting them to reject Judge Bork's nomination.

September 8, 1987

Taylor, William L. The Bork Record, Wash. Afro-American at 5, col. 4.

Bork finds insupportable the Court's 1948 decision in Shelly v.

Kramer, (334 U.S. 7) holding that judicial enforcement of racially restrictive covenants violates the 14th Amendment. He opposed passage of the provisions of the 1964 Civil Rights Act banning discrimination in public accommodations (though in his confirmation hearings in 1973 he said he had changed his mind). He thought the Supreme Court was wrong in upholding provisions of the 1965 Voting Rights Act banning the use of literacy tests under certain circumstances. Apart from his opposition to the Court invalidating poll taxes and Congress banning literacy tests for voting, Bork has expressed vigorous opposition to the Supreme Court's decisions establishing the rule of "one man, one vote." He finds no basis for these decisions in the 14th Amendment. While he posits another possible theory (the guarantee of a republican form of government) he makes it clear that many malapportionment schemes now prohibited would be allowed under his theory.

September 17, 1987

Bork Leads Movement Back to Legal Discrimination, The St. Louis American at 5A, col. 5.

A review of Judge Bork's court decisions indicate his ultraconservative views that the government has broad powers to discriminate against nonracial minority groups if the majority desires to do so; that the federal government should seldom interfere to block even the largest companies from merging with one another; and that the Supreme Court's one person, one vote reapportionment decisions exceed the bounds of judicial authority.

As a further example, Judge Bork has criticized the U.S. Supreme Court's decision in Shelley v. Kramer (which held that courts could not use judicial power to enforce real estate contracts that bar property ownership by Blacks).

September 22, 1987

Bork Confirmation as Justice: The Witnesses For and Against Nomination, N.Y. Times at B6, col. 1.

Barbara C. Jordan, Ex-Representative of Texas: "We once had a poll tax in Texas. That poll tax was used to keep people from voting, The Supreme Court said it was wrong--outlawed it, outlawed it. Bork said the case was wrongfully decided....Judge Bork has his theory: "If you can't find that right within the letters of the Constitution explicitly, it's not there, it doesn't exist."

Bork Has Read Certain Groups Out of the Constitution

September 17, 1987

Coleman, William T. Too Much at Stake for Bork Approval, The St. Louis American at 4A, col. 4.

There are two paramount reasons why the Senate should reject the nomination. The first is Judge Bork's repeatedly expressed determination to overrule cases that have recognized in the Constitution many of the fundamental liberties that Americans

legitimately consider to be their birthright. Judge Bork rejects, for example, the long-established view that the explicit guarantee of "liberty" in the due-process clause encompasses more than merely freedom from physical restraint but also includes a range of other personal freedoms, including privacy. Thus, Bork denounces a right of people not to be sterilized against their will; a right to marry, establish a home and bear children; a right to be taught a foreign language and a right of parents to send their children to private schools. Second, Judge Bork proposes step by step to reduce drastically the scope of the equal protection clause of the 14th Amendment. First, he argues that the clause does not address matters other than racial equality. Equality for women and many others is thereby simply read out of the Constitution. Having limited the 14th Amendment to racial equality alone, Judge Bork nevertheless labels "wrong" many of the leading constitutional cases in which Blacks have won judicial redress for racial discrimination. Finally, even though Judge Bork repeatedly insists that aggrieved individuals and groups should seek redress through the legislative process rather than the courts, when Congress has legislated to promote Black equality Judge Bork has frequently argued that Congress's efforts are unconstitutional or interfere with whites' "liberty" to discrimination.

Bork's Words Unsettle Blacks

September 21, 1987

Raspberry, William. A Problem with Bork, Wash. Post at ?, col. 1.

Judge Bork comes off as a man who believes that many of the civil gains are, no matter how fervently he endorses the results, based on unwarranted interpretations of the Constitution. The problem with Bork is not that he is philosophically inflexible, as some critics charge, or that he desires "bad" legal results, as other critics fear. The trouble is his near-fiendish unpredictability. Is he the conservative constitutional scholar, lawyer and judge who for 25 years has been critical of the Supreme Court rulings that have increase the rights of minorities and women? Or is he the reasonable jurist who, for the past week, has been paddling furiously toward the legal mainstream? Is this the sort of person on whom women and unpopular minorities should be willing to take a chance? "They read his unsettling words, and they say 'no.' I say no."

September 24, 1987

Gilliam, Dorothy. Two Humble Arguments Against Judge Bork, Wash. Post at D3, col. 1.

A highlight of William T. Coleman Jr., the former secretary of transportation, testimony before the Senate Judiciary Committee was his fear that Bork would turn back the clock on civil rights and

affect gains some take for granted if he were elevated to the high court. "With the exception of Brown v. Board of Education," he told the committee, "[Bork] has criticized and rejected every landmark civil rights case since that time [1954]." Barbara C. Jordan, the former representative from Texas who also spoke before the committee best voiced the intensely personal opposition of many Blacks in her view of the court's role: "I like the idea that the Supreme Court...is the last bulwark of protection for our freedoms.... I don't want to see the argument made that there is no right to privacy on the court. And the only way to prevent its being made is to deny Judge Bork membership on the court."

September 24, 1987

Taylor, Stuart. Burger and a Former Carter Aide Praise Bork's Civil Rights Record, N.Y. Times at 1, col. 2.

Former Chief Justice Warren E. Burger denounced what he called "a campaign of disinformation" by some Bork opponents. Lloyd N. Cutler, who was counsel to President Carter, called the nominee "a highly qualified conservative jurist who is closer to the moderate center than to the extreme right." But historian John Hope Franklin, a history professor at Duke University, gave a poignant account of the "degradation of Blacks in the South, including a time when a train conductor "stopped the train and put us out in the woods" when his mother refused "to go to the [N]egro coach." He said of Judge Bork: "One searches his record to find a civil rights advance that he supported from its inception. Nothing in

Judge Bork's record suggests to me that had he been on the Supreme Court at an earlier date he would have had the vision and the courage to strike down a statute requiring the eviction of a Black family from a train for sitting on the so-called [N]egro coach."

Black Southerners Said No

October 4, 1987

Russakoff, Dale. Bork's Hill Testimony Failed to Charm South, Wash. Post at A12, col. 1.

The simple political reality behind the eroding support for Supreme Court nominee Robert H. Bork is that the bearded, former Yale professor did not win the hearts of Southerners. Voters initially favorable to Bork as a conservative backed by Reagan turned increasingly lukewarm as his confirmation hearings progressed, according to regional polls and interviews with a range of southern voters and political analysts. Bork's assertion in his confirmation hearings that the Constitution does not protect a general right to privacy struck at an ingrained southern desire to be left alone, the analysts said. And his record of early opposition to the Civil Rights Act inflamed Black voters, the most potent element of the southern Democratic coalition. A critical factor was the impassioned fear expressed by Black voters who, as one-quarter of the electorate in the Deep South, provided the margin of victory for four southern Democratic freshmen elected to the Senate last November. Asked why Bork's assertions in favor of

civil rights during his confirmation hearings had little effect, Jerome Gray, field director of the Alabama Democratic Conference, a formidable, statewide coalition of Black religious and civic groups stated, "We know a tree by the fruit it bears, and the fruit he's been bearing in the past has not been good for us." The help given to southern Democrats by Black voters is undeniable. According to exit polls, Blacks supplied the margin of victory in November for Senators Richard C. Shelby (D-Alabama), Wyche Fowler Jr. (D-Georgia), John Breaux (D-Louisiana) and Terry Sanford (D-North Carolina). Each got only a minority of the white vote, and close to 90% of the Black vote. The lack of intense feeling among southern conservatives is perhaps the biggest surprise of the Bork debate. "This man was not the southerner's idea of a hero," said Atlanta pollster Claibourne Dorden. "We just got through making Ollie North our hero and here comes a real dry, peculiar-looking fellow who won the heart of very few." In this light, Dorden and other cautioned against interpreting the vote simply as a sign of expounded Black political power in the South. "This is still a region where politicians are careful what they give the Black vote, so they don't alienate the white vote," he said. "So the folks who vote against Bork will say to their Black voters, 'Now we did something for you,' and they won't get too much negative recourse from the whites. That's what you call a safe issue."

October 4, 1987

Walsh, Edward. Bork's Foes Built Strategy on South, Wash. Post at 1, col. 1.

In early September, Michael Donilon, the president of a Boston polling firm and younger brother of a senior political adviser to Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Delaware) drafted a strategy memo on the battle over confirmation of Supreme Court nominee Robert H. Bork. Donilon's memo entitled, "The Bork Nomination and the South," argued that the presumption that Bork would be a popular choice among conservative southern whites was "just plain wrong." "In fact," Donilon wrote, "the potential for the development of intense opposition to Bork is perhaps greater in the South than in any other region. Bork poses the risk of reopening race relations battles which have been fought and put to rest," Donilon wrote. "Bork flouts the southern tradition of populism. And (perhaps most surprising to some) Bork poses a challenge to a very strong pro-privacy sentiment among southern voters." With Democrats in control of the Senate Judiciary Committee, the Bork confirmation hearings were built around these themes. As a result, the battle has been fought on terms dictated by Bork's opponents, throwing him and his Republican allies on the defensive from the start. The success of this campaign that focused on Bork's writings on civil rights and privacy issues was reflected in the corridor comments of southern Democrats and their formal statements announcing that they would vote against confirmation."

"There's a perception in Alabama--from a lot of whites as well as Blacks--that Bork could bring an unsettling effect to the court," said Senator Richard C. Shelby (D-Alabama), who has not yet announced his position. "In the South, we've made a lot of progress. We do not want to go back and revisit old issues that are settled." Early Friday morning, Senator Lloyd Bentsen (D-Texas), a highly successful businessman before he entered politics, spoke on the Senate Floor about Bork's criticism of the public accommodations section of the Civil Rights Act of 1964 at the time the bill was being debated in Congress. The year before enactment of the measure, Bentsen recalled, the first major hotel in Houston was integrated by hard-headed business leaders who recognized the inevitability of change. "As the head of the company that owned that hotel, I find [Bork's] statement repugnant," Bentsen said. "Maybe this is unfair to Judge Bork," Senator J. Bennette Johnson (D-Louisiana) said after announcing he would vote against confirmation. "But we just cannot take a chance."

October 8, 1987

Toner, Robin. Saying No to Bork, Southern Democrats Echo Black Voters, N.Y. Times at 1, col. 3.

The opposition of southern senators to Judge Robert H. Bork reflects a crucial political reality in the region: the electoral fortunes of many southern Democrats depend on overwhelming support from Blacks. As a result, a powerful lever was pulled when Judge

Bork's opponents campaigned on the charge that he would "turn back the clock" on civil rights. Some Black politicians and civil rights leaders from the South led their constituents in letter-writing campaigns and petition drives. "Black voters got the message quickly and acted on it," said Ann F. Lewis, a Democratic consultant to the Alliance for Justice, an anti-Bork group. The message was particularly effective with the class of '86, those southerners who won election to the Senate a year ago because of huge Black majorities. "I think it worked against us," said Tom Korologos, a lobbyist for the White House on the Bork issue. "We lost this nomination on November 4, 1986." Mr. Bork's supporters angrily asserted that his civil rights record was actually quite strong and was grossly distorted by his opponents. Without a strong wave of support for Mr. Bork, and with the sentiments of Blacks running high, the choice for southern Democrats was clear, in the view of many politicians. "A senator has far more to lose on voting for Bork than voting against him," said Joe Reed, head of the Alabama Democratic Conference, on influential Black political organization. "A senator has far more to lose on voting for Bork than voting against him," said Mr. Reed. "Six months from now, he's another lawyer or judge who got turned down. He has no line of constituents behind him."

October 9, 1987

Cohen, Richard. The Civil Rights Thing, Wash. Post at A27, col. 1.

Columnists are always imposing on history, imploring it to note something of momentary interest. But in a spare moment, history might want to reflect on how much Robert Bork has in common with Ronald Reagan and why the president could not possible understand how others could find Bork so objectionable. There is not the slightest suggestion in Bork's record that he is a racist. Similarly, there is nothing in Reagan's past to suggest that he is a racist. And yet both Reagan and Bork have opposed civil rights legislation. Initially, Reagan opposed every recent civil rights act. As for Bork, he not only criticized a court decision striking down the poll tax, he also found fault with the Civil Rights Act of 1964. Bork, the intellectual, anguished over the rights of proprietors. Reagan, no intellectual, nevertheless struck the same note: even bigots "have certain constitutional rights." Reagan has persisted in extolling equality while ensuring that the government does little to enforce it. In 1982, the Justice Department overturned precedent and attempted to grant Bob Jones University, which expels students for interracial dating or marriage, a Federal tax exemption. A popular president can weather the antipathy of Blacks and, indeed, even win a landslide election. But the Reagan presidency has always been an odd affair. The country has counted on both Congress and the courts to restrain the President--to rein in his impulses to trash various civil rights laws. While Blacks know they have no champion in the White House,

they also know there is little real damage Reagan could do. But a Supreme Court nomination is entirely different matter. In the first place, votes for confirmation come from individual senators. Their constituencies are not national. Some senators, particularly Democrats recently elected from the South, owe their seats to Black support. Second, the court itself is one of the ropes restraining Reagan in the White House. Should it snap, should a Bork tip the balance, then the antipathy Reagan has to government enforcement of civil rights might no longer be just a potential threat. The monster would be loose. The rejection of the Bork nomination proves the permanence of the Civil Rights revolution and its acceptance and should suggest to Reagan how out of step he is with most Americans when it comes to civil rights. He has never understood that. Now maybe he will.

October 16, 1987

Raspberry, William. Back in Reagan's Court, Wash. Post at A23.

President Reagan has exposed the partisan nature of his continuing fight with his defiant threat to send up another nominee that the Senate would "object to as much as they did this one." He wants to punish those senators who dared to vote against him. But the victims of this determination are more likely to be Bork and Reagan himself. The 54 senators who have announced their opposition to Bork include a goodly number of southern Democrats who understand that whatever punishment Reagan can dish out is minor compared with

the punishment their Black constituents can levy. But Reagan's judgment seems blinded by anger. Having lost the game, he is betting his dwindling prestige on the instant replay.

Black Leadership Said No

October 7, 1987

Wiley, Ed. Black Leaders Have Reason to Oppose Bork, Wash. Times at F12, col. 4.

Mr. Lawrence Wade's September 24 column, "Defending rights of the Black elite" was racially offensive and lacked any semblance of intellectual effort. Mr. Wade, who is Black, advocates that Black elites, unlike white elites, were less sincere in their denunciation of the judge. Black leaders, he contended, spoke out only in an effort to preserve their prominent niches in society. Under Mr. Wade's premise, Frederick Douglass, W.E.B. Dubois, Mary Bethune-Cookman, Dr. Martin Luther King, Jr., and a host of other members of the Black elite had no natural right to speak out for poor Blacks. Mr. Wade should note that poor Blacks weren't complaining about so much representation, just as they aren't complaining about the outspokenness of former Transportation Secretary William T. Coleman. Jr. and Mr. Andrew Young and Ms. Barbara Jordan today. Most agree that they can use all the help possible in attaining the rights more easily afforded whites. It is not a far-fetched assumption that Ms. Jordan, Mr. Young, and Mr.

Coleman testified at the Bork hearings because they were genuinely concerned about the appointment of an obviously sinister Supreme Court justice who would use his power to nullify the civil rights advancements that each had worked so hard to see implemented. Or perhaps they felt compelled to speak after reflecting on the impact that their Black elitist predecessors had in helping them aspire.

October 31, 1987

Lewis, Charles A. The Black Vote on Bork, Wash. Afro-American at 5, col. 3.

The crushing defeat president Reagan suffered on the nomination of Judge Robert H. Bork to the Supreme Court reveals that the President ignored the strength of the Black voters. The Black vote as a whole was unorganized but it made the difference because many southern senators, upon which the administration had relied, won their seats by overwhelming support from their Black constituents. It was not so much a matter of conscience or goodness of heart, but political reality that made southern senators reject Bork. They voted to save their collective skins. The American Bar Association (ABA) failed to consult the Black bar association [The National Bar Association] in testimony supporting Bork. This is typical because its views coincide with those of Reagan who is not considering many of the recognized Black legal minds for the high bench Reagan is considering prospective nominees. But if any prospect shares Bork's reactionary views, the same results are likely to occur.

Blacks For Bork: He's Misunderstood

September 14, 1987

Raspberry, William. Bork and Blacks, Wash. Post at A19, col. 2.

Sixteen years ago, when President Nixon first nominated William Rehnquist to the Supreme Court, Ronald R. Davenport, the Black dean of the Duquesne University Law School, thought it a dreadful appointment. Rehnquist scared Davenport. Robert Bork doesn't. "Upon a review of his record, I have concluded that Bork has been unfairly painted as a right-wing ideologue. I don't mean to suggest that he is sort of a closet liberal. He isn't. He is a conservative, but he is a thoughtful man who can be persuaded." He is also Davenport's former law professor (at Yale) and a friend of 25 years. The most serious rap against Bork, says Davenport, is his contention that the public accommodations provisions of the Civil Rights Act amounted to an unconstitutional infringement of property rights. Bork has since recanted that opinion.

September 26, 1987

Bork Debate: Panel Listens for Voices of the Past, the Present and the Future, N.Y. Times at 33, col. 1.

On the second week of hearings on Judge Robert H. Bork included a spirited defense of Judge Bork by the economist Thomas Sowell, one of the nation's most prominent Black scholars. "...Gradually, but steadily over the past 35 years, more and more decisions have been

take out of the hands of the American people and vested in courts....No one has opposed these judicial trends more consistently or more ably than Robert H. Bork, first as a scholar and then as a judge. Mr. Bork has rejected the idea that judges should engage in 'heroic adventures in policy making,' as he calls it....What Mr. Bork has fought against consistently over the years has been in his words, 'government by judges who are applying the Constitution....' Civil rights need to be understood, not simply as a special benefit to minorities, but as something essential to everyone....State-imposed discrimination was central to the racial oppression of Blacks during the Jim Crow era in the South. Judge Bork opposed this central focus of racial discrimination from Brown v. Board in the 1950's to Washington v. Davis in the 1970's through his work on the Court of Appeals in the 1980's. His criticisms of particular parts, of particular laws in court decisions have often been in terms of the extension of constitutional roles from the government to private individuals and nongovernmental organizations.... It was precisely this principle which many raised in the restrictive covenant cases which are not simply cases about whether you are for or against housing discrimination."

September 29, 1987

Robertson, Claire and Thornton, Mary. Griffin Bell Urges Bork's Confirmation, Wash. Post at A10, col. 1.

Jewel LaFontant, who served under Bork in 1973 as the first Black female deputy solicitor general said of Bork, "I sincerely believe he is devoid of racial prejudice or I wouldn't be here. As a woman, as a Black woman, I have no fear of trusting my rights and privileges to Robert Bork."